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IN THE

Supreme Court of the United States

_____ Term, 1970

No. 1544

MELVIN LEE HOYT AND JOSEPH S. LEE,
Petitioners,

v.

STATE OF MINNESOTA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court for the State of Minnesota

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Petition for a Writ of Certiorari to the Supreme Court for the State of Minnesota

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above-entitled proceeding on February 6, 1970.

Opinion Below

Petitioner Melvin Lee Hoyt was tried in the Municipal Court for the City of St. Paul, at St. Paul, Minnesota, before his Honor Stephen Maxwell, sitting without a jury because defendant had waived his right to trial by jury, and on November 21, 1967, the Honorable Stephen Maxwell made a finding of guilty. No written opinion was rendered by the trial judge. A fine of $100.00 was imposed.

Petitioner Joseph S. Lee was tried in the same Court before the same judge, also without a jury, petitioner having waived the same. On May 15, 1968, the Honorable Stephen Maxwell, Judge of the Municipal Court made a finding of guilty and rendered no written opinion. A fine of $100.00 was imposed.

The two cases tried by the Honorable Stephen Maxwell were thereafter appealed to the Supreme Court of the State of Minnesota and there consolidated and considered as one case for the purposes of appeal. The cases were argued as Docket No. 41177 (*State v. Hoyt*) and Docket No. 41436 (*State v. Lee*) on January 7, 1969.

The Supreme Court of the State of Minnesota in an opinion rendered on February 6, 1969, affirmed the conviction of the Trial Court in each case. A copy of that opinion and of the dissenting opinion by Justice James C. Otis is attached hereto as Appendix A.

Jurisdiction

The judgment of the Minnesota State Supreme Court was entered and filed on February 6, 1970. No petition for rehearing was filed and the decision became final February 17, 1970, when judgment was entered. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1257 (3).

Questions Presented

1. Whether Minnesota Statutes Annotated 617.241 as applied herein to permit conviction of petitioners on the ground that five books are obscene abridges petitioners' exercise of free speech and deprives them of their liberty and property without due process of law contrary to the First and Fourteenth Amendments of the Constitution of the United States.

2. Whether the books are obscene in the constitutional sense, absent any evidence of pandering or assault on individual privacy, or sale to minors.

3. Whether petitioners convictions under Minnesota Statutes Annotated 617.241 deprive petitioners of free speech and property under the First and Fourteenth Amendments when

a) No evidence whatsoever was offered to show the books involved exceed the limits of candor in the nation as a whole, and

b) No evidence whatsoever was offered to the effect that the books were utterly without redeeming social importance, or

c) That they appeal to the prurient interest.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First, Fifth, and Fourteenth Amendments to the Constitution of the United States, and Minnesota Statutes Annotated 617.24. Also involved is Title 28 U.S.C.A. Sec. 1257 (3).

Constitutional Provisions:

1. The pertinent provisions of the First Amendment to the United States Constitution are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Title 28 U.S.C.A., Section 1257, provides in part as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

5. The Minnesota Statutes Annotated, Section 617.241 provides as follows:

"It is unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish,

distribute, or attempt to distribute any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statue, drawing, or other article which is obscene. 'Obscene' for the purpose of this section, is defined as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests."

"Any person violating any provision of this section shall be fined not less than $20 nor more than $100 for each offense."

Statement of the Case

Both cases were tried to the Municipal Court of Saint Paul, Minnesota without a jury. A finding of guilty was made in each case by the Court with no written opinion. Petitioners' motions for findings of acquittal were denied.

On appeal to the Minnesota Supreme Court the issues raised by assignment to error were:

1) Whether the State had the burden of proving by qualified witnesses the elements of obscenity specified in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed (2d) 1. and

2) Whether it was error to exclude other books offered by petitioner Lee to establish contemporary standards, and

3) Whether as a matter of law the First Amendment of the United States Constitution required reversal.

The Minnesota Supreme Court ruled that the "material speaks for itself," and that "evidence would add nothing". It held the books to be obscene as a matter of law. It thus held that no evidence of the elements of obscenity was required and that it was not error to exclude the exhibits offered by Petitioner Lee.

Reasons for Granting the Writ

Rather than belabor the Court with citations of cases and articles dealing with the subject of obscenity in this petition, petitioners will set forth as briefly as possible their reasons for believing the Writ should be granted and refer the Court to the Summary of Authorities in the dissenting opinion of Justice Otis in the opinion below.

1. The decision below allows conviction without evidence bearing on the elements of obscenity as prescribed by the United States Supreme Court.

The prosecutions herein followed the pattern of establishing the sale of each book by one of the petitioners, placing the book in evidence, and resting. No evidence, testimonial or otherwise, was offered to prove that the books exceeded the limits of candor in the nation as a whole, appealed to prurient interest, or were utterly without redeeming social importance.

That question has not been passed on by this Court. Obviously the problem is one of great importance and one that keeps recurring.

In *U.S. v. Klaw* (2 cir.) 350 F. (2d) 155, 157, the Court condemned the process of submitting obscenity cases to jurors without evidence of what does or does not appeal to the prurient interests of the average person.

Petitioners submit that the question of whether or not evidence of the elements of obscenity is necessary to sustain a conviction is of sufficient importance in and of itself to justify granting the Writ herein. However, additional grounds of almost equal importance appear

2. The decision below holds that no error was committed in refusing to accept in evidence petitioners' evidence of contemporary community standards.

Even though the prosecution offered no evidence on community standards, petitioner Lee sought to introduce certain books he had purchased in the locality of the trial at well known stores. Among them was "Fanny Hill". The court sustained objections to these exhibits.

We submit that where petitioners' right to sell books is secured by the First Amendment so long as the book does not offend contemporary community standards, evidence of those standards is essential. To hold otherwise permits a defendant to be convicted of exceeding a community standard with no showing of what the standard may be!

Thus, not only did the prosecutor offer no evidence on the elements of obscenity, the defense was not allowed to.

3. Holding the five books in question to be obscene as a matter of law violated petitioner's rights to free speech under the First Amendment, and deprived him of his property without due process of law.

In a dissenting opinion in this proceeding, Justice Otis of the Minnesota Supreme Court stated

> "With respect to the five books here for consideration, I have no hesitation in expressing a personal opinion that their dominant theme, taken as a whole, appeals to the prurient interest in sex and is utterly without redeeming literary or social value. However, as offensive as they are, I submit we cannot on this record say as a matter of law they go substantially beyond customary limits of candor in description or representation of matters of sex.
>
> Under the rule laid down by the United States Supreme Court in Redrup v. New York 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed (2d) 515, and subsequent cases relying on Redrup, I am convinced that the material before us enjoys First Amendment protection." (Pages 11 and 12 of dissent)

In summary—we submit that the Writ should be granted here so the Court can rule on the question of the need for evidence of the elements of obscenity and on whether the accused can offer comparable works of literature to help establish the standard of the community. We submit also that the Court should reverse the holding that the five books are obscene as a matter of law in accord with Redrup, supra.

Conclusion

For the foregoing three reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Minnesota.

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APPENDIX

NOS. 1 & 2 (1969)
MUNICIPAL COURT
CITY OF ST. PAUL
MURPHY, J.
DISSENTING, OTIS, J.

STATE OF MINNESOTA,
Respondent,
41177 vs.
MELVIN LEE HOYT,
Appellant.
STATE OF MINNESOTA,
Respondent,
41436 vs.
JOSEPH S. LEE,
Appellant.

ENDORSED
FILED
FEBRUARY 6, 1970
JOHN McCARTHY,
CLERK
MINNESOTA SUPREME COURT

SYLLABUS

A review of the evidence in support of the charge that defendants sold certain books in violation of Minn. St. 617.241 supports the trial court's conclusion that the material contained in said books, taken as a whole, is obscene, as defined by the statute, and not the subject of free speech or press protected by the First Amendment.

Affirmed.

OPINION

Murphy, Justice.

These appeals arise out of convictions for the sale of obscene books by clerks employed at 480 Wabasha Street in the city of St. Paul. Because the principal issues are identical, the cases have been consolidated for oral argument and disposition by this court.

Defendant Melvin Hoyt was charged with having sold three obscene books on August 31, 1967, *The Way of a Man with a Maid, Adam and Eve,* and *Business as Usual.* Defendant Joseph Lee was charged with having sold two obscene books on January 8, 1968, *Lady Susan's Cruel Lover* and *True Love Stories of Growing Up.* The complaints allege that the sales were in violation of Minn. St. 617.241.

Defendants were tried separately by the municipal court of the city of St. Paul without a jury and each was convicted, defendant Hoyt on November 21, 1967, and defendant Lee on May 15, 1968. Each was fined $100, the maximum penalty permitted for a misdemeanor.[1]

The issues raised in the two appeals are (1) whether the state has the burden of proving by qualified witnesses the elements of obscenity specified in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U. S. 413, 86 S. Ct. 975, 16 L. ed, (2d) 1; (2) whether it was error to exclude other books offered by defendant Lee to establish contemporary community standards; and (3) whether as a matter of law under the tests established by Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. ed. (2d) 515, and subsequent decisions of the United States Su-

[1] In each instance the trial court treated the multiple sales as a single offense pursuant to Minn. St. 609.035.

preme Court citing that case, the First Amendment of the United States Constitution requires a reversal.

Section 617.241 under which defendants were convicted was adopted in 1961 and provides as follows:

> "It. is unlawful for any person knowingly to exhibit, sell, print, offer to sell, give away, circulate, publish, distribute, or attempt to distribute any obscene book, magazine, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, play, image, instrument, statue, drawing, or other article which is obscene. 'Obscene' for the purpose of this section, is defined as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests.
>
> "Any person violating any provision of this section shall be fined not less than $20 nor more than $100 for each offense."

It may be assumed that this statute was drafted to embody the rules enunciated by the United States Supreme Court in Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. (2d) 1498, where it was held that obscenity is not within the area of constitutionally protected speech or free press and defines it as follows (354 U. S. 489, 77 S. Ct. 1311, 1 L. ed. [2d] 1509):

> "* * * [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

From an examination of the material which is the subject of these prosecutions, we conclude that the convictions should be affirmed. In light of the case law,[2] the dominant theme of the material appeals to the prurient interest of the average person and, applying contemporary community standards, is patently offensive and utterly without redeeming social importance.

It is unnecessary to discuss the details of these books further than to observe that the theme of each is pointless save as it serves to relate the characters to repeated accounts of lewd and degrading episodes. They deal with filth for the sake of filth.

In answer to the appellants' assertion that the convictions are unsupported by evidence bearing upon the social value of the books and their acceptance by community standards, we can only say that such evidence would add nothing. The material speaks for itself. If it is not obscene, the word has lost

---

[2] See, State v. Oman, 261 Minn. 10, 110 N. W. (2d) 514; Rosen v. United States, 161 U. S. 29, 16 S. Ct. 434, 40 L. ed. 606; Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. (2d) 1498; Kingsley Books, Inc. v. Brown, 354 U. S. 436, 77 S. Ct. 1325, 1 L. ed. (2d) 1469; Smith v. California, 361 U. S. 147, 80 S. Ct. 215, 4 L. ed. (2d) 205; Manual Enterprises, Inc. v. Day, 370 U. S. 478, 82 S. Ct. 1432, 8 L. ed. (2d) 639; Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. ed. (2d) 793; A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U. S. 413, 86 S. Ct. 975, 16 L. ed. (2d) 1; Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 16 L. ed. (2d) 31; Redrup v. New York, 386 U. S. 717, 87 S. Ct. 1414, 18 L. ed. (2d) 515; Kahm v. United States (5 Cir.) 300 F. (2d) 78, Klaw v. Schaffer (2 Cir.) 251 F. (2d) 615, affirming Id. (S. D. N. Y.) 151 F. Supp. 534; Parmelee v. United States, 72 App. D. C. 203, 113 F. (2d) 729; United States v. Levine (2 Cir.) 83 F. (2d) 156; United States v. One Book Called "Ulysses" (2 Cir.) 72 F. (2d) 705, affirming Id. (S. D. N. Y.) 5 F. Supp. 182; United States v. Dennett (2 Cir.) 39 F. (2d) 564; United States v. Kennerley (S. D. N.Y.) 209 F. 119; State v. Vollmar (Mo.) 389 S. W. (2d) 20; Adams Theatre Co. v. Keenan, 12 N. J. 267, 96 A. (2d) 519; People v. Muller, 96 N. Y. 408, 48 Am. R. 635; City of Cincinnati v. King (Mun. Ct.) 11 Ohio O. (2d) 433, 168 N. E. (2d) 633.

all meaning. We identify it for what it is and hold that it is obscene as a matter of law.

Affirmed.

OTIS, Justice (dissenting).

The decision of the United States Supreme Court which now appears to govern prosecutions for obscenity is Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. ed. (2d) 515, and its companion cases. Redrup is significant not only because there is a redirection of emphasis on the elements of obscenity but because of the reliance placed on the decision in a long series of per curiam reversals which have occurred subsequently. In reversing criminal convictions, which had been affirmed by appellate courts of New York and Kentucky, and a judgment ordering the destruction of certain magazines, which had been affirmed by the Supreme Court of Arkansas, the court in Redrup stated with respect to those decisions (386 U. S. 769, 87 S. Ct. 1415, 18 L. ed. [2d] 517):

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. * * * In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. * * * And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U. S. 463."

The divergent attitudes of members of the Supreme Court were noted in a succinct per curiam opinion, but the court concluded that whatever constitutional view was brought to bear

on the cases it was clear the judgments could not stand. Only Mr. Justice Harlan and Mr. Justice Clark dissented. A review of the material approved in Redrup, and in the subsequent cases which summarily reversed convictions on the basis of Redrup, persuades me that however offensive I find the books on which we are passing judgment in the instant case, we cannot, consistent with our duty to apply the Constitution as construed by the United States Supreme Court, sustain these convictions.

Pre-Redrup Decisions

Ten years ago, the Supreme Court reversed the New York Grand of Appeals in Kingsley International Pictures Corp. v. Regents, 360 U. S. 684, 79 S. Ct. 1362, 3 L. ed. (2d) 1512, holding that the state could not deny a license to show the motion picture "Lady Chatterley's Lover" merely because the picture represented that adultery under certain circumstances may be proper behavior. Thereafter, in Manual Enterprises, Inc. v. Day, 370 U. S. 478, 82 S. Ct. 1432, 8 L. ed. (2d) 639, the court had occasion to pass on the application of a Federal Statute prohibiting shipment of obscene material through the mail. Some of its observations foreshadowed recent decisions which I believe govern. The court said the magazines were not so offensive on their face as to affront current community standards of decency, which it equated with patent offensiveness or indecency, citing as follows A. L. I., Model Penal Code, proposed Official Draft (May 4, 1962) § 251.4(1), which it had approved in Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. ed. (2d) 1498:

"Material is obscene if, considered as a whole, its

> predominant appeal is to prurient interest * * * and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." (Italics supplied.)

Under the Federal statute, the court said, there must be proof of both patent offensiveness and prurient appeal before the material may be found obscene. It went on to indicate that the test was a national standard of decency. In addition, the court made reference to, but did not decide, whether Roth v. United States, *supra*, and its other decisions were aimed only at hard-core pornography and concluded by noting (370 U. S. 490, 82 S. Ct. 1438, 8 L. ed. [2d] 648):

> "* * * [T]he most that can be said of [the magazines] is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.'"

The rules governing obscenity were expanded in Jacobellis v. Ohio, 378 U. S. 184, 84 S. Ct. 1676, 12 L. ed. (2d) 793. There the state court held a French moving picture to be obscene, and the Supreme Court reversed. In so doing, it rejected the argument that the question of obscenity is a purely factual judgment on which a jury's verdict is all but conclusive. Obscenity was said to be a matter of constitutional law which has to be decided by a court. The majority emphasized that obscenity is excluded from the constitutional protection only because it is "'utterly' without redeeming social importance." Again, the court cited and approved A. L. I., Model Penal Code, in emphasizing the necessity for a finding that the material "goes substantially beyond customary limits of

candor in describing or representing such matters." 378 U. S. 191, 84 S. Ct. 1680, 12 L. ed. (2d) 800. It applied to a state law the rule that "contemporary community standards" means a national community and not a local community. In concluding, the court suggested (378 U. S. 195, 84 S. Ct. 1682, 12 L. ed. [2d] 802):

> "* * * State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination."

On the same date, the Supreme Court reversed a Florida decision which held *Tropic of Cancer* obscene. Grove Press, Inc. v. Gerstein, 378 U. S. 577, 84 S. Ct. 1909, 12 L. ed. (2d) 1035, reversing Grove Press, Inc. v. State ex rel. Gerstein (Fla. App.) 156 So. (2d) 537.

In 1966, the court attempted to summarize and clarify its previous decisions in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" [Fanny Hill] v. Attorney General, 383 U. S. 413, 418, 86 S. Ct. 975, 977, 16 L. ed. (2d) 1, 5. There the court said that under its Roth definition of obscenity—

> "* * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

The court held that the Massachusetts court had erred in holding that a book need not be "unqualifiedly worthless before it can be deemed obscene." The correct rule was held to be (383 U. S. 419, 86 S. Ct. 978, 16 L. ed. [2d] 6):

> "* * * A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive."

A new note was introduced in the test of obscenity by the court's emphasis on the circumstances of production, sale, and publicity (383 U. S. 420, 86 S. Ct. 978, 16 L. ed. [2d] 7):

> "* * * Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. * * * All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact * * * that the book will have redeeming social importance * * *."

On the same date, the court decided Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 16 L. ed. (2d) 31. In Ginzburg, the court upheld a conviction under the Federal obscenity laws because of the evidence of pandering to which it had made reference in the Fanny Hill case. The court said that circumstances of presentation and dissemination of material claimed to be obscene were relevant to the issue of social

importance. The court concluded (383 U. S. 475, 86 S. Ct. 950, 16 L. ed. [2d] 41):

> "* * * Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

In dissenting, Mr. Justice Stewart, without attempting to define hard-core pornography, articulated his concept with the following illustration (383 U. S. 499, note 3, 86 S. Ct. 957, note 3, 16 L. ed. [2d] 54, note 3):

> "* * * Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material * * * cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment * * *."

In a companion case, Mishkin v. New York, 383 U. S. 502, 86 S. Ct. 958, 16 L. ed. (2d) 56, a New York conviction for hiring others to produce obscene books and possessing them with the intent to sell them was upheld. The material depicted heterosexual and homosexual relations as well as sadomasochism and fetishism. Again, Mr. Justice Stewart dissented, stating (383 U. S. 518, 86 S. Ct. 969, 16 L. ed. [2d] 67):

> "* * * However tawdry those books may be, they are not hard-core pornography, and their publication is, therefore, protected by the First and Fourteenth Amendments."

The Trials

At the trial of defendant Hoyt, an officer of the St. Paul Police Department testified that on August 31, 1967, he entered a bookstore at 480 Wabasha Street and purchased from defendant three paperback books for $2.50 each, entitled *Adam and Eve, Business as Usual,* and *The Way of a Man with a Maid.* A sergeant in the vice unit was asked if he had an opinion as to whether or not the books were obscene. Defendant objected on the ground there was no proper foundation. He was overruled. The officer thereupon testified that in his opinion the books were obscene. The state rested and defendant moved for dismissal on the ground no prima facie case had been presented. The motion was denied and defendant rested.

In the prosecution of defendant Lee, a member of the vice unit of the St. Paul Police Department testified that on January 8, 1968, at 480 Wabasha Street, he purchased from defendant two books for which he paid $2.50 and $3, entitled

Lady Susan's Cruel Lover and *True Love Stories of Growing Up*. Because the officer had read only portions of the books, objection was sustained to his testifying as to whether or not in his opinion they were obscene. Thereupon, the state rested without further testimony. Defendant Lee moved for dismissal on the ground the state had failed to prove a case. The motion was denied.

As part of defendant's case, counsel attempted to show contemporary community standards by reference to other books purchased in a number of well-known bookstores in the same metropolitan area at about the same time. He offered in evidence *Fanny Hill* and books entitled *My Secret Life, Crazy Wild*, and *Busy Bodies*. Objection by the state was sustained. Defendant then rested.

Expert Testimony

The question of whether a finding of obscenity by a court or jury can be sustained without evidence bearing on the elements prescribed by the United States Supreme Court has not yet been determined by that court. The state seized on isolated statements taking the position that the issue of obscenity is one which a trier of the fact may decide without supporting evidence. In Kingsley Books, Inc. v. Brown, 354 U. S. 436, 448, 77 S. Ct. 1325, 1331, 1 L. ed. (2d) 1469, 1478, Mr. Justice Brennan in a dissent said:

> "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its

definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

In an opinion dissenting in part in Smith v. California, 361 U. S. 147, 171, 80 S. Ct. 215, 228, 4 L. ed. (2d) 205, 221, Mr. Justice Harlan said he did not believe that opinion testimony of experts was obligatory but he was of the view that obscenity could be established by other means. However, he advocated granting a new trial because the lower court had failed failed to permit any evidence of contemporary community standards.

A number of state and Federal courts have held that except in rare cases obscenity cannot be established without competent testimony. A leading decision in this area is Dunn v. Maryland State Bd. of Censors, 240 Md. 249, 213 A. (2d) 751. The lower court there found a motion picture was obscene and denied permission to show it. The Maryland Court of Appeals reversed. It held that the State Board of Censors had not sustained its burden of proof by merely offering the film in evidence. The court observed that without enlightening testimony neither the trial court nor the appellate court was qualified to determine whether the material exceeded constitutional standards. Although the appellate court found the picture "tiresome, boring, cheap, often vulgar and sometimes revolting," it felt that neither it nor the trial court was competent to determine whether to the average person applying contemporary community standards the dominant theme was an appeal to prurient interest. 240 Md. 257, 213 A. (2d) 755. Nor would the court pass on whether the picture exceeded customary limits of candor in its representations of sex, or

whether it was utterly without redeeming social importance or literary or artistic value.

A Federal court took a similar approach in United States v. Klaw (2 Cir.) 350 F. (2d) 155, 167, suggesting that to rely on the material itself was an inappropriate resort to the doctrine of res ipsa loquitur. There, the court condemned the process of permitting jurors to use their own reactions as the community standard without testimony of what does or does not appeal to the prurient interest of the average person. Such an approach, the court felt, would permit a conviction merely because the material was undesirable, distasteful, and disgusting.

In City of Phoenix v. Fine, 4 Ariz. App. 303, 420 P. (2d) 26, the Arizona Court of Appeals dismissed a civil action to enjoin the sale of material found to be obscene where only the material was in evidence. In this posture, the court held that the trial judge's decision would have to be based on either his own personal views or on his independent research in the field of psychology, literature, or sociology. This the court condemned as a kind of hidden judicial notice which would give the parties no opportunity to examine the source material in an adversary manner.

The Oklahoma Supreme Court in Ramirez v. State (Okla. Cr.) 430 P. (2d) 826, reached a similar conclusion. There the only evidence of obscenity in a criminal prosecution tried to a jury was a film claimed to be offensive. This left the jury free to speculate on the elements of obscenity, the court held. As in United States v. Klaw, *supra*, the Oklahoma court rejected a res ipsa loquitur approach. The fact that the film may have impressed the jury as trash, undesirable, and disgusting did not establish the proof adequate to sustain a conviction.

Without evidence relating to contemporary community standards relating to social importance, the court held as a matter of law there was no sufficient evidence to support the verdict. The conviction was reversed. As the court suggested in Poulos v. Rucker (M. D. Ala.) 288 F. Supp. 305, 309, it is no disrespect to police officers to insist that in this sensitive area decisions be made according to more rigorous standards, employed by more expertly trained persons, than standards fixed by members of the vice squad.

More recently, the problem was considered by the Supreme Court of California in In re Giannini, 69 Cal. (2d) 563, 574, 72 Cal. Rptr. 655, 663, 446 P. (2d) 535, 543. There, in reversing a conviction for presenting publicly nude entertainment, the court held:

> "* * * We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards, either that [defendant's] conduct appealed to prurient interest or offended contemporary standards of decency."

The court recognized a split of authority regarding the burden of proof but concluded that expert testimony should have been introduced to establish community standards.

> "* * * We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards. An even-handed application of the criminal law, even with evidentiary guidance * * * is sufficiently difficult in an area so confusing and intricate as obscenity. To sanction convictions

> without expert evidence of community standards encouragees the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror."

I am impressed by the reasoning of cases which require a more thoughtful consideration of the elements of obscenity than is permitted by reliance on the subjective reaction of the factfinder. While it may be argued that in a case tried to a court without a jury there is a presumption that in arriving at a decision the judge will have in mind all of the elements of the offense, in this area of judicial responsibility he has no particular expertise on which to draw. In effect, he is called on to take judicial notice of whether the dominant theme of the material appeals to a prurient interest in sex; whether it affronts contemporary community standards relative to sex; and whether it is utterly without redeeming social value. In my opinion, neither judge nor jury is qualified to make such findings of fact so as to deprive a defendant of First Amendment protection without more evidence than the material itself.[1] For that reason, I would reverse the convictions here for review.

Comparable Material

In determining contemporary community standards, I submit it was error for the trial court to exclude from evidence other books currently acceptable to the reading public.[2]

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[1] The United States Supreme Court has granted certiorari in a case which deals with the state's burden of proof, Stein v. Batchelor (N. D. Tex.) 300 F. Supp. 602. U. S. Law Week, Vol. 38, No. 22 (December 8, 1969).

[2] It might be relevant, for example, that *Portnoy's Complaint* and *Naked Came the Stranger* were number three and number four best sellers in the area of fiction last fall. Time Magazine, October 3, 1969.

Although the trial court must necessarily have broad discretion in limiting the kind and volume of evidence which may properly be received for purposes of comparison, I think it improper to exclude from evidence *all* such evidence. Certainly it is germane that the approach and format of the material alleged to be offensive are similar to those which have been approved by the court in books such as *Fanny Hill,* which the court here refused to receive. Counsel should be permitted to argue that the books challenged in a particular case do not exceed in candor other material expressly approved by judicial decision or openly sold in ordinary bookstores, from which it may be inferred they do not affront community standards.

This was the conclusion reached by the Maryland Court of Appeals in Yudkin v. State, 229 Md. 223, 182 A. (2d) 798, where books comparable to *Tropic of Cancer,* offered for comparison by the jury, were held to have been erroneously excluded.

More recently, the Supreme Court of Pennsylvania has held in Commonwealth v. Dell Publications, Inc. 427 Pa. 189, 202, 233 A. (2d) 840, 847:

> "There are two yardsticks by which contemporary community standards may be judged. One is to compare the challenged book to other books which have either been held entitled to the protection of the First Amendment or, in the absence of litigation, which meet contemporary standards and are substantially similar to the challenged book. The other is to consider the reception the book received from the community when it was released."

I do not suggest that a defendant has a right to deluge the

court with other material claimed to have community approval or sanctioned by judicial decision. However, within manageable limits, it is incumbent upon the factfinder to assess community standards by reference to what is patently acceptable. To that end, the defendant should not have been arbitrarily precluded from offering in evidence material which he claimed was comparable, and I believe that it was error to deny him that opportunity.

Effect of Redrup on Determination of Customary Limits of Candor

In his concurring opinion in the Fanny Hill case, Mr. Justice Douglas stated (383 U. S. 427, 86 S. Ct. 981, 16 L. ed. [2d] 10):

> "We are judges, not literary experts or historians or philosophers. We are not competent to render an independent judgment as to the worth of this or any other book, except in our capacity as private citizens. * * * If there is to be censorship, the wisdom of experts on such matters as literary merit and historical significance must be evaluated."

Mr. Justice Stewart in Jacobellis v. Ohio, *supra*, was of the opinion that obscenity laws are constitutionally limited to hard-core pornography. In his concurring opinion, without attempting to define hard-core pornography, which he doubted he could do intelligibly, he made this much-quoted observation (378 U. S. 197, 84 S. Ct. 1683, 12 L. ed. [2d] 804):

> "* * * But I know it when I see it, and that motion picture involved in this case is not that."

With respect to the five books here for consideration, I have no hesitation in expressing a personal opinion that their dominant theme, taken as a whole, appeals to a prurient interest in sex and is utterly without redeeming literary or social value. However, as offensive as they are, I submit we cannot on this record say as a matter of law they go substantially beyond customary limits of candor in description or representation of matters of sex.

Under the rule laid down by the United States Supreme Court in Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. ed. (2d) 515, and subsequent Supreme Court cases relying on Redrup, I am convinced that the material before us enjoys First Amendment protection.

It is clear to those courts which are struggling to find a definition of hard-core pornography that the United States Supreme Court is hopelessly divided on the subject and no longer attempts to fashion a precise definition. The state and Federal courts are therefore left to distill their own rules as best they can, based on an analysis of the many decisions which the Supreme Court has reversed on the authority of the Redrup case.[3]

However burdensome may be a protracted recitation of the material which has now been granted First Amendment protection, I know of no better way to illustrate the scope of the Supreme Court's ruling in Redrup v. New York, *supra*. There is therefore set out in Appendix B a verbatim summary by the Federal district court of the material which on appeal was held *not* to be hard-core pornography in Aday v. United States, 388 U. S. 447, 87 S. Ct. 2095 18 L. ed. (2d) 1309. The

[3] Since May 8, 1967, when Redrup was decided, the Supreme Court has reversed some 20 lower court decisions by reference to Redrup in cases set forth as Appendix A.

trial court in that case sustained convictions for mailing obscene material in interstate commerce. United States v. West Coast News Co. (W. D. Mich.) 228 F. Supp. 171. The Sixth Circuit United States Court of Appeals affirmed, characterizing the material as follows (357 F. [2d] 855, 858):

> "* * * Without palliating interruption, the story moves quickly from one sexual enterprise to another. So numerous are these events that even the practiced skill of the author runs out of fresh imagery and dully repeats his supply of leering adjectives."

The court thereupon concluded that "we know hard core pornography when we see it." The Supreme Court reversed.

A book held not obscene by the Supreme court in Corinth Publications, Inc. v. Wesberry, 388 U. S. 458, 87 S. Ct. 2096, 18 L. ed. (2d) 1310, was characterized by the highest court of Georgia as devoted to lengthy and vivid accounts of preparation for and acts of sexual promiscuity, which the Georgia court said were "* * * filthy and disgusting. Further description is not necessary, and we do not wish to sully the pages of the reported opinions of this court with it." Id. 221 Ga. 704, 710, 146 S. E. (2d) 764, 768.

The material which the United States Supreme Court held protected in Books, Inc. v. United States, 388 U. S. 449, 87 S. Ct. 2098, 18 L. ed. (2d) 1311, was condemned by a distinguished Federal judge, Charles Wyzanski, Jr., in Id. (1 Cir.) 358 F. (2d) 935, 936, as follows:

> "* * * Adulteries, seductions, and orgies are the only events of importance. The contacts described include not only sexual intercourse, but sodomy and other perversions. There is not any serious effort to portray the reality of cultural or social conditions of

even the most neurotic or sordid portion of the population."

The opinion of the Kansas Supreme Court, State ex rel. Londerholm v. A Quantity of Copies of Books, 197 Kan. 306, 416 P. (2d) 703, reversed by the United States Supreme Court, A Quantity of Copies of Books v. Kansas, 388 U. S. 452, 87 S. Ct. 2104, 18 L. ed. (2d) 1314, described the material held obscene as reciting, to the exclusion of anything else, illicit sexual capers and feats of sexual prowess and perversion, patently offensive and having no appeal except to the prurient. The books made no effort to present ideas, to tell a story, or advance human knowledge or understanding in science, literature, or art, and the Kansas court held they lacked any redemptive feature of social value or importance. Nevertheless, they were given First Amendment protection.

A case of particular sign ficance reversed per curiam by the United States Supreme Court in reliance on Redrup is Central Magazine Sales, Ltd. v. United States, 389 U. S. 50, 88 S. Ct. 235, 19 L. ed (2d) 49. The opinions of the lower courts, United States v. 392 Copies of a Magazine Entitled "Exclusive" (D. Md.) 253 F. Supp. 485, 492, and Id. (4 Cir.) 373 F. (2d) 633, 634, describe nude photographs posed in precisely the same manner as those contained in *True Love Stories of Growing Up*, one of the two books which was the subject of the prosecution of defendant Lee.

A motion picture which was held obscene in Robert Arthur Management Corp. v. State, 220 Tenn. 101, 414 S. W. (2d) 638, was described by the Tennessee Supreme Court as having no appeal except to prurient interest, devoid of any literary, scientific, or artistic value, and utterly without social importance.

"* * * If this film is not patently offensive to the public or does not go substantially beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film * * * The effect of the film is just to add to the sexual filth already in the world." 220 Tenn. 113, 414 S. W. (2d) 643.

Notwithstanding these findings, the decision was reversed by the United States Supreme Court in Robert-Arthur Management Corp. v. Tennessee ex rel. Canale, 389 U. S. 578, 88 S. Ct. 691, 19 L. ed. (2d) 777.

Redrup Tests Applied by Other Courts

A careful reading of the cases cited leads me to the inescapable exclusion that the books here for consideration cannot be held criminally obscene unless the state has proved beyond a reasonable doubt one or more of the significant elements to which the court made reference in Redrup. In other words, the test seems to be whether or not the sale or distribution was directed at juveniles; whether it was an obtrusive assault on individual privacy; and whether there was evidence of pandering.

My views in this regard are fortified, I submit, by a number of other decisions which have sought to apply the Redrup rule. The United States Court of Appeals in Grant v. United States (9 Cir.) 380 F. (2d) 748, reversed a conviction for using the mails to sell what it described as rotten books, obsessed with sex, which were at best "junk." The court held that they were of the same quality as those dealt with in the Redrup case. A similar result was reached in People v. Stabile, 58

Misc. (2d) 905, where the Criminal Court of New York City felt obliged to dismiss criminal complaints in reliance on Redrup although the court noted that the material before it was "coarse, puerile, offensive and distasteful." 58 Misc. (2d) 912.

I subscribe to the assessment made by the Supreme Court of Pennsylvania in Commonwealth v. Dell Publications, Inc. 427 Pa. 189, 210, 233 A. (2d) 840, 852. There, the court observed that Redrup may yet prove to be the most significant of the obscenity opinions and seems to signify the Supreme Court's final abandonment of its futile search for a definition of obscenity. The court observed that Redrup approached the problem by reference to the circumstances under which publication of the material might be constitutionally restricted. The court then set forth the three elements described in Redrup and found none of them present. The lower court's finding that the book *Candy* was obscene was reversed. Three other jurisdictions have laid similar stress on Redrup: The federal District Court for Maryland in United States v. 4,400 Copies of Magazines, 276 F. Supp. 902; the Ohio Court of Common Pleas in State v. J. L. Marshall News Co. 13 Ohio Misc. 60, 232 N. E. (2d) 435; and the Michigan Court of Appeals in Wayne County Prosecutor v. Doerfler, 14 Mich. App. 428, 463, 165 N. W. (2d) 648, 664.[4]

The United States Court of Appeals for the Eighth Circuit in an opinion written by Judge Donald Lay, Luros v. United States, 389 F. (2d) 200, has also called attention to the areas in which the court in Redrup said prosecutions might succeed. That court, too, felt that Redrup indicated an attitude to ban only hard-core pornography. Although the material in

[4] See, also, Poulos v. Rucker (M. D. Ala.) 288 F. Supp. 305; People v. Bonanza Printing Co. —— Cal. App. (2d) ——, 76 Cal. Rptr. 379.

the Luros case was described as "just plain trash," there was said to be insufficient evidence of pandering to affirm a conviction. Judge Lay concluded his opinion by adopting what I consider the proper approach to this difficult area of the law (389 F. [2d] 206:[5]

> "Many well-intentioned citizens become disgusted or offended with the freedom by which purveyors of trash place their publications in the mail. But within the juridical balance is the basic concern over governmental interference into free channels of expression. It is far better there be a tight rein on authoritarian suppression, notwithstanding a conflict with some individuals' tastes or customary limits of candor, than that we live in a stifled community of self-censorship where men must feel apprehension over expression of an unpopular idea or theme. Still within our human possession is the free will to make an independent choice of values and to teach our children to do the same. Paternalistic censorship by government must continue to limit that choice only in the most extreme of circumstances. Thus we view the general reluctance of the law to go further in this area."

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[5] Judge Lay's views find strong support in Stanley v. Georgia, 394 U. S. 557, 89 S. Ct. 1243, 22 L. ed. (2d) 542, where the United States Supreme Court noted that there appears to be little empirical basis for the assertion that exposure to obscenity may lead to deviant sexual behavior or crimes of violence, citing Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009; Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate, summarized in an appendix to the concurring opinion of Judge Frank in United States v. Roth (2 Cir.) 237 F. (2d) 796, 814.

Summary

By way of summary, I do not feel the material before us comes within the test of what is forbidden by Redrup for the following reasons:

(a) There was no evidence that the material was being sold to juveniles and no statute forbidding such sales was involved. In this connection, it should be noted that the Supreme Court has sustained such a statute in Ginsberg v. New York, 390 U. S. 629, 636, 88 S. Ct. 1275, 1279, 20 L. ed. (2d) 195, 202. In other decisions it has also expressed a solicitous concern for restricting these First Amendment rights to purchases by adults. Interstate Circuit, Inc. v. City of Dallas, 390 U. S. 676, 690, 88 S. Ct. 1298, 1306, 20 L. ed. (2d) 225, 235; Stanley v. Georgia, 394 U. S. 557, 89 S. Ct. 1243, 22 L. ed. (2d) 542. The court has made it clear that a statute similar to Minn. St. 617.241 would be upheld and conviction sustained were the purpose of the law to prevent the sale of obscene material to juveniles.

(b) In the instant case, evidence was introduced to show that books dealing with sex were prominently displayed throughout the store and were its principal stock in trade. This testimony, however, was directed at the issue of scienter. There is no showing nor any claim that the displays were obtrusive or an assault upon individual privacy. It is not argued that an unwilling individual would find it impossible to avoid exposure to the publications in question.

(c) Finally, the record is bare of any evidence of pandering such as warranted a conviction in Ginzburg v. United States, 383 U. S. 463, 86 S. Ct. 942, 16 L. ed. (2d) 31. That case involved extensive advertising and solicitation and a deliberate and studied attempt to emphasize "the sexually

provocative aspects of the work, in order to catch the salaciously disposed." The court went on to say: "[The petitioners] proclaimed its obscenity; and we cannot conclude that the court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence." 383 U. S. 472, 86 S. Ct. 948, 16 L. ed. (2d) 39. Whatever may have been the motives or the manner of production and distribution of the books which are the subject of this litigation, there is nothing before us to support a finding of pandering of the kind condemned in the Ginzburg case. I would therefore hold that Redrup v. New York, *supra*, and the subsequent decisions of the United States Supreme Court based on that case require a reversal.

APPENDIX A

The following United States Supreme Court decisions have reversed lower courts on the authority of Redrup v. New York, Austin v. Kentucky, and Gent v. Arkansas, 386 U. S. 767, 87 S. Ct. 1414, 18 L. ed. (2d) 515, [rehearing denied as to Austin v. Kentucky, 388 U. S. 924, 87 S. Ct. 2091, 18 L. ed. (2d) 1377]:

Keney v. New York, 388 U. S. 440, 87 S. Ct. 2091, 18 L. ed. (2d) 1302.

Friedman v. New York, 388 U. S. 441, 87 S. Ct. 2091, 18 L. ed. (2d) 1303.

Ratner v. California, 388 U. S. 442, 87 S. Ct. 2092, 18 L. ed. (2d) 1304.

Cobert v. New York, 388 U. S. 443, 87 S. Ct. 2092, 18 L. ed. (2d) 1305.

Sheperd v. New York, 388 U. S. 444, 87 S. Ct. 2093, 18 L. ed. (2d) 1306.

Avansino v. New York, 388 U. S. 446, 87 S. Ct. 2093, 18 L. ed. (2d) 1308.

Aday v. United States, 388 U. S. 447, 87 S. Ct. 2095, 18 L. ed. (2d) 1309, reversing United States v. West Coast News Co. (6 Cir.) 357 F. (2d) 855.

Books, Inc. v. United States, 388 U. S. 449, 87 S. Ct. 2098, 18 L. ed. (2d) 1311, reversing Id. (6 Cir.) 358 F. (2d) 935.

A Quantity of Copies of Books v. Kansas, 388 U. S. 452, 87 S. Ct. 2104, 18 L. ed. (2d) 1314, reversing State ex rel. Londerholm v. A Quantity of Copies of Books, 197 Kan. 306, 416 P. (2d) 703.

Mazes v. Ohio, 388 U. S. 453, 87 S. Ct. 2105, 18 L. ed. (2d) 1315, reversing State v. Mazes, 7 Ohio St. (2d) 136, 218 N. E. (2d) 725.

Schackman v. California, 388 U. S. 454, 87 S. Ct. 2107, 18 L. ed. (2d) 1316.

Potomac News Co. v. United States, 389 U. S. 47, 88 S. Ct. 233, 19 L. ed. (2d) 46, reversing United States v. 50 Cartons Containing 19,500 Copies of Magazine Entitled "Hellenic Sun" (4 Cir.) 373 F. (2d) 635.

Conner v. City of Hammond, 389 U. S. 48, 88 S. Ct. 234, 19 L. ed. (2d) 47.

Central Magazine Sales, Ltd. v. United States, 389 U. S. 50, 88 S. Ct. 235, 19 L. ed. (2d) 49, reversing United States v. 392 Copies of Magazine Entitled "Exclusive" (4 Cir.) 373 F. (2d) 633.

Chance v. California, 389 U. S. 89, 88 S. Ct. 253, 19 L. ed. (2d) 256.

I. M. Amusement Corp. v. Ohio, 389 U. S. 573, 88 S. Ct. 690, 19 L. ed. (2d) 776, reversing State v. I. & M. Amusements, Inc. 10 Ohio App. (2d) 153, 226 N. E. (2d) 567.

Robert-Arthur Management Corp. v. Tennessee ex rel. Canale, 389 U. S. 578, 88 S. Ct. 691, 19 L. ed. (2d) 777, reversing Robert Arthur Management Corp. v. State, 220 Tenn. 101, 414 S. W. (2d) 638.

Felton v. City of Pensacola, 390 U. S. 340, 88 S. Ct. 1098, 19 L. ed. (2d) 1220, reversing Id. (Fla. App.) 200 So. (2d) 842.

Henry v. Louisiana, 392 U. S. 655, 88 S. Ct. 2274, 20 L. ed. (2d) 1343, reversing State v. Henry, 250 La. 682, 198 So. (2d) 889.

Carlos v. New York, —— U. S. ——, 90 S. Ct. 395, 24 L. ed. (2d) 303.

APPENDIX B

Summary by the Federal court of material held not to be obscene in Aday v. United States, 388 U. S. 447, 87 S. Ct. 2095, 18 L. ed. (2d) 1309, reversing United States v. West Coast News Co. (6 Cir.) 357 F. (2d) 855. The material was described by the trial court in an appendix to its opinion, United States v. West Coast News Co. (W. D. Mich.) 228 F. Supp. 171, 201, as follows:

"DESPERATE MOMENTS:

"Moved by the syndicate's murder of her husband, the main character, herself maimed, changes her name and sets out to revenge her husband's death. Her method of operation is to have sexual intercourse with the members of the syndicate, working her way to the murderer.

"After lively competition with the girls already used by the syndicate, the heroine succeeds in killing the leader, her husband's murderer.

"Among the numerous sexual activities in the book one finds: exhibition for a photographer of nudes, in many postures; mass intercourse lasting some five hours with the syndicate members—to 'qualify' her; sexual intercourse with a crippled twisted gnome in order to earn information; extremely sadistic sexual intercourse in a pool of blood drawn by the knives of the participants.

"The physical organs are referred to at will and are distorted. The characters have little dimension and are unrealistically portrayed. 154 pages.

"LOVE PRINCESS:

"A young girl with wild extraordinary sexual cravings moves from man to man to satisfy her lust. She is raped by her stepfather, rapes a truck driver in a garbage filled alley, seduces her boss, her boyfriend, and a bus driver, enjoying extended intercourse with all of them.

"This nymph is generously endowed physically, her partners being graphically described. The book includes frequent allusion to the private parts. Passion, sadism, and masochism are emphasized. 140 pages.

"I AM A LESBIAN:

"Two girls find they have strong attraction for each other, vow eternal love and share lesbian lovemaking. The jealous boy next door, angry at their antics, rapes one of the girls; she becomes pregnant, the baby is born dead. The victim is befriended by an older man.

"Repeated unhappiness in her normal relationships leads the main character to return to lesbianism. The author repeatedly shows marital sex as inferior to lesbian sex in pleasure, intensively describing the acts between the girls. 119 pages.

"DECISIVE YEARS:

This is the story of a twelve year old girl and her sexual experiences. She is tutored by a thirteen year old, and initiated by her dead mother's last lover. She goes to live with an older man and there meets his girl friend who maneuvers the heroine into lesbian lovemaking. She continues her lesbian affairs with another woman, and is finally 'cured' by rape and a beating by the man she is living with.

"The genitals are described generally consistent with the age of the participants; they are most intimately and insistently referred to in most episodes. Brutality plays its part in the acts of sex. While two years are once compressed into two pages, a single sex episode takes many more pages. 151 pages.

"BLACK NIGHT:

"An average housewife loses her husband to amnesia and pimping, joins a brothel in an attempt to recover him. We become acquainted with the various members of the house, and see the housewife and her husband reunited, unknown to him. The wife finally confronts her husband with the girl he favors during his periods of amnesia; after trying her, the husband decides to return to his wife.

"The genitals are only moderately emphasized; sadism is stressed in at least one episode. While the book span is six or seven months, the one night brothel scene occupies 60 of the 126 total pages.

"WITCHFINDER:

"A widow with two children is forced into fellatio by the town Romeo; by a tape recording trick he spreads the word that she desires to repeat this upon all comers. Time after time, she is forced to repeat the act until the town women learn of it and plan to tar and feather her. She is finally ridden naked through the area on a pole covered with sharp splinters. The widow is rescued by members of the local whore house who persuade her to make her acts a house specialty. After a byplay between Rod and a woman who wants only to participate in cunnilingus, Rod obliging, and a detailed reference

to the joys of oral sexual pleasures, the book ends with an observation by the local preacher.

"The stress is on the mouth as a genital organ. Sadistic torture appears. 141 pages.

"NEVER ENOUGH:

"The main character begins his story by leaving the navy, in Norfolk, meeting a prostitute in a bar, having sexual intercourse with her, and being rolled. In a quite unrelated fashion, he then becomes a used car salesman, and we learn that no woman has ever satisfied him.

"The story is then a series of episodes between the main character and willing women. After much intercourse, unsuccessful seduction, bizarre flashbacks, and a nymphomaniac from nowhere, the sexual craving of our character finally leads him to a young girl with whom he is satisfied.

"The sexual equipment of the characters is grossly emphasized. The sex acts all culminate in wild pleasure. Sadism and masochism are featured. Characters leave and enter the story with no apparent relationship with the story. 132 pages.

"SEX LIFE OF A COP:

"The story essentially follows the activities of two policemen as they patrol the streets of a town. Each encounter with a female leads to mutually desired intercourse—in fact the women seem to be the aggressors. Two married girlfriends, a drunk woman found on the street, a waitress, the female police dispatcher, the mayor's wife, each other's wives, a female news reporter, two nurses, a woman reporting a prowler, a woman with 'heater trouble', the madam of a brothel, all join in sexual intercourse with the policemen.

"In addition, sex is introduced by reference throughout the book. Lover's Lane and parked cars yield confrontation of people in varying states of undress and activity.

"The genitals are repeatedly referred to, being oversized. The book is written in graphic, vivid, sexual language. All the accomplishments of the two main characters happen in a time span of two weeks. One week is explained by one sentence; one episode of intercourse takes four pages. The official acts of the policemen are conspicuously few. 142 pages."

(Verbatim quotation of appendix in 228 F. Supp. 201 [1965].)

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IN THE

Supreme Court of the United States

October Term 1969
No. 1544

MELVIN LEE HOYT AND JOSEPH S. LEE,
Petitioners,

vs.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term 1969
No. 1544

MELVIN LEE HOYT AND JOSEPH S. LEE,
Petitioners,

vs.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the petition for writ of certiorari to the Supreme Court of the State of Minnesota in the above entitled matter be denied and respectfully shows to the court:

OPINIONS BELOW

The opinion of the Supreme Court for the State of Minnesota is reported at 174 N.W. 2d 700.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the convictions under Minnesota Statutes, Section 617.241, which prohibits the sale or distribution of obscene material, violate petitioners' rights under the First and Fourteenth Amendments to the United States Constitution.

2. Whether proper tests were utilized in determining the character of the books to be obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution and the Minnesota Statute involved are set forth in the Petition at pp. 3-5.

2. The pertinent provisions of the Supreme Court Rules (28 USC Rule 19) provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

STATEMENT OF THE CASE

This litigation comes before the court from an opinion rendered by the Supreme Court of the State of Minnesota affirming convictions for the sale of obscene books by clerks employed at the Wabasha Book Store in the City of Saint Paul.

1. Case of Melvin L. Hoyt

On April 11, 1967, Sergeant Robert Kunz, working out of the Vice Unit of the Saint Paul Police Department, entered a book store at 23 West Seventh Street in the City of Saint Paul. He had a brief conversation with the clerk whom he identified as the petitioner, Melvin L. Hoyt. Mr. Hoyt showed Sergeant Kunz a girly magazine and sold him a paperback book.

On July 3, 1967, Sergeant Kunz entered the Wabasha Book Store at 480 Wabasha Street in the City of Saint Paul where petitioner Hoyt was employed as a clerk. The officer examined the store and described the premises as having bookracks on three walls with two additional racks in the center. Photographs of the store were submitted as State's Exhibits A-J. The officer stated all the photographs and books he observed pertained to nudity and sex. On this occasion petitioner Hoyt showed Sergeant Kunz a magazine exhibiting male genitalia and sold him a book and a packet of photographs R. p. 7).

On July 5, 1967, Sergeant Kunz returned to the Wabasha Book Store accompanied by Sergeant Edward E. Fitzgerald of the Saint Paul Police Department. Sergeant Fitzgerald testified that he observed the magazines and books on the racks. He described the materials as paperback books dealing with sex relations and photographs of nudes of both sexes in various poses (R. p. 14).

On August 31, 1967, Sergeant Fitzgerald returned to the the book store alone. Upon entering he found petitioner Hoyt and a few customers in the store. He selected four books which he purchased from petitioner Hoyt. Three of the books; *The Way of a Man With a Maid, Adam and Eve,* and *Business as Usual,* are the subject matter of this litigation. (State's Exhibits K, M and N).

On September 1, 1967, complaint was made against petitioner Hoyt under Minnesota Statutes 617.241. The matter came on for trial before the Honorable Stephen L. Maxwell, Judge of Municipal Court, City of Saint Paul on November 14, 1967. Petitioner and his counsel waived the right to a jury and the trial was had before the court (R. p. 3). After hearing testimony the court recessed to read the State's Exhibits and make determinations as the finder of fact. On November 21, 1967, the court having read State's Exhibits K, M and N, found petitioner Melvin L. Hoyt guilty and imposed a general sentence of $100 fine.

2. Case of Joseph S. Lee

The case of petitioner Lee is similar to that of petitioner Hoyt set forth above. On January 8, 1968, Officer Jerrell L. Navara, working out of the Vice Unit of the Saint Paul Police Department, entered the Wabasha Book Store where Joseph Lee was employed as a clerk. Officer Navara gave a similar physical description of the premises testifying that all the books and photographs he observed pertained to nudity and sexual matter (R. p. 5). After looking around the store for a short period of time the officer selected two books for purchase. He advanced to the front counter and presented the books, *Lady Susan's Cruel Lover* and *True Love Stories of*

Growing Up, to petitioner Lee who made the sale (R. p. 11). Officer Navara left the store after making the purchase.

Complaint was again brought under Minnesota Statutes 617.241 and the matter came on for trial before the Honorable Stephen L. Maxwell, Judge of Municipal Court, City of Saint Paul, on May 7, 1968. The petitioner Lee waived a jury through his counsel and the case was tried to the court (R. p. 3). Petitioner offered certain exhibits purchased by his counsel on local bookstands. Objection to these items was sustained (R. p. 28). After receiving testimony the court recessed to read the State's Exhibits and make determinations of fact. On May 15, 1968, the court found petitioner Lee guilty as charged and imposed a general sentence of $100 fine.

ARGUMENT

I

The Supreme Court of the State of Minnesota Has Not Decided a Federal Question in a Way Not in Accord With Applicable Decisions of This Court.

Petitioners were convicted under a state statute aimed only at material obscene in character. This court in *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, dwelt at length on the subject of freedom of speech in relation to obscenity and concluded it is not within the area of constitutionally protected speech or press. The findings of the trial court and the independent appellate review conclude that under tests proposed by this court the material in question is obscene. As a result petitioners' rights under the First and Fourteenth Amendments were not violated since the sales that

are the subject of this litigation are not constitutionally protected. *Winters v. New York,* 333 US 507, 68 S. Ct. 665, 92 L. Ed. 840; *Kingsley Books Inc. v. Brown,* 354 US 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469; *Adams Newark Theatre Co. v. Newark,* 354 US 931, 77 S. Ct. 1395, 1 L. Ed. 2d 1533; *Ginzburg v. United States,* 383 US 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.

Petitioner Lee alleges a violation of his rights occurred when the trial court failed to receive certain books offered by him into evidence. We submit the proferred evidence was properly excluded as being irrelevant to the issue of whether or not the books sold by the petitioner were obscene. A similar situation was presented in *People v. Finkelstein,* 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100. In holding the evidence properly excluded the court stated:

> "* * * The fact that certain other and different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold,* or *read,* or that to the average person applying contemporary community standards (Roth v. United States, supra) they were not obscene." 183 N.E. 2d 661, at pp. 663-664.

While not unmindful of the observations by Justices Frankfurter and Harlan in *Smith v. People of State of California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we feel the exclusion of the evidence in this case did not offend those views. It is not persuasive that one victory in spreading obscenity establishes community standards. We agree that petitioners might have submitted proper evidence of contemporary community standards but they offered none in this case and have

not been deprived of due process. *United States v. Oakley*, 290 F. 2d 517, cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87, rehearing den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198. *Womack v. United States*, 294 F. 2d 204, cert. den. 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822.

Petitioners further allege the necessity of additional evidence regarding the elements of obscenity is necessary to sustain the convictions. In its opinion, the Minnesota Supreme Court stated as follows:

> "In answer to the appellants' assertion that the convictions are unsupported by evidence bearing upon the social value of the books and their acceptance by community standards, we can only say that such evidence would add nothing. The material speaks for itself. If it is not obscene, the word has lost all meaning. We identify it for what it is and hold that it is obscene as a matter of law." 174 N.W. 2d 700 at p. 702.

While we can visualize instances where additional testimony would be helpful in determining whether the elements of obscenity are present, this court has not indicated that presentation of such evidence by the prosecution is a constitutional requirement. Rather, it has been said that the state retains broad powers to regulate obscenity and we submit such power includes the manner in which the court receives evidence. *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498; *Stanley v. Georgia*, 37 L.W. 4315. The present case involves no factual dispute relating to obscenity and the only issue is whether the material satisfies the statutory requirements and can be forbidden under the standards established by this court. This is a question of law upon which the lower court properly exercised its judgment.

II

The Supreme Court of the State of Minnesota Has Not Decided a Federal Question in a Way to Require an Exercise of This Court's Power of Supervision.

In considering the merits of petitioners' appeals the Supreme Court of the State of Minnesota stated the following:

> "From an examination of the material which is the subject of these prosecutions, we conclude that the convictions should be affirmed. In light of the case law, the dominant theme of the material appeals to the prurient interest of the average person and, applying contemporary community standards, is patently offensive and utterly without redeeming social importance." 174 NW 2d 700 at pp. 701-702.

In so affirming the court utilized a proper test in determining that the character of the books in question was obscene. *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 US 413, 86 S. Ct. 975, 16 L. Ed. 2d 1. *Ginzburg v. United States*, 383 US 463, 86 S. Ct. 942, 16 L. Ed. 2d 31. *Redrup v. New York*, 386 US 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515.

In addition the Minnesota Court retained its responsibility for rendering judgment upon the issue of constitutional infringement by making an independent review of the evidentiary basis on which the lower court findings were based. *Kahn v. United States*, 300 F. 2d 78, cert. den. 369 US 859, 82 S. Ct. 949, 8 L. Ed. 2d 18.

We submit that the decision of the lower court was correct in determining that the dominant theme of the material taken

as a whole appealed to a prurient interest in sex; that it was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters; and that it was utterly without redeeming social value. *Roth v. New York, supra.* As a result there is no special or important reason for this court to review the matters before it on Writ of Certiorari.

CONCLUSION

WHEREFORE, Respondent respectfully prays that the petition for Writ of Certiorari to the Supreme Court of the State of Minnesota be denied.

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